

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1231

To be argued by
JONATHAN J. SILBERMANN

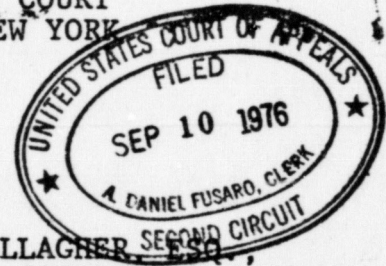
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Plaintiff-Appellee,
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:
-against-
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LASZLO JERMENDY,
:
:
Defendant-Appellant.
:
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B
P75
Docket No. 76-1231

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, Esq.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
LASZLO JERMENDY
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JONATHAN J. SILBERMANN,
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PAGINATION AS IN ORIGINAL COPY

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Felony <input type="checkbox"/> JUDGE/Assigned Trial Minor Offense <input type="checkbox"/> MAGISTRATE 0721 Other Misdemeanor <input type="checkbox"/> 207 District Office 1		U.S. vs. 75 CR 785-1 IASZLO JERMENDY defendant		Day No. 25 Date 11/13/75
U.S. CODE SECTION 18:641,2		OFFENSES Did steal a firearm in possession of special agent of the Secret Service		CASE NO. 1 Bail Not Made <input type="checkbox"/> Bail Status Changed (See Docket) <input type="checkbox"/>
U.S. Attorney or Asst. Steven Kimelman		Defense: L CJA, L Ref, L Waived, L Self, L None, L Other, L D, L CC Legal Aid		Bail Not Made <input type="checkbox"/> Bail Status Changed (See Docket) <input type="checkbox"/>

I. CHARGES II. KEY INTERVALS & DATES	ARREST S.S. or U.S. Custody Began on Above Charges 9/30/75	INDICTMENT Information <input type="checkbox"/> High Risk Defn. & Date Design'd Waived <input type="checkbox"/> Superseding <input type="checkbox"/> Indict/Info <input type="checkbox"/>	ARRAIGNMENT 11/13/75 1st Plea " Final Plea	TRIAL Trial Set For 1/7/76 Vol'd/Dir <input type="checkbox"/> Trial Began 3/15/76 Trial Ended 3/19/76	Dismissed <input type="checkbox"/> AMT - Credit Set (000) 50 date <input type="checkbox"/> Bail Not Made <input type="checkbox"/> Bail Status Changed (See Docket) <input type="checkbox"/>
	Prosecution Deferred				

Search Warrant	Issued	Return	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
					9/30/75		
Summons	Issued				PRELIMINARY EXAMINATION OR REMOVAL HEARING		
	Served				<input type="checkbox"/> Waived <input type="checkbox"/> Not Waived	<input checked="" type="checkbox"/> Intervening Indictment	<input type="checkbox"/> Dismissed <input type="checkbox"/> Held for District CJ <input checked="" type="checkbox"/> Held to Answer to U. S. District
Arrest Warrant			8/28/75	MS			
COMPLAINT			8/28/75	MS			
OFFENSE (In Complaint)	Violation of T-18, U.S.C. Sec. 641,2						

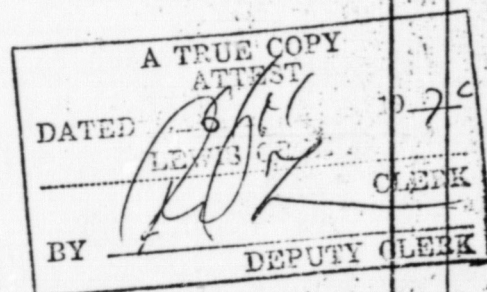
Show last names and suffix numbers of other defendants on same indictment/information JOHN DOE-2		V. Exclu
DATE	PROCEEDINGS	
10/24/75	Before NEAHER, J.- Indictment filed	
10-30-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed.	
10-30-75	Writ Issued.	
11-6-75	Before Bramwell, J - case called - deft not present - counsel M.Seltzer present - adjd to Nov. 13, 1975 by consent.	
11-6-75	Writ ret'd and filed - Executed.	
11/6/75	Petition for writ of habeas corpus ad prosequendum filed writ issued	
11/13/75	Before BRAMWELL, J.- Case called- deft and counsel present deft waives reading of indictment and enters a plea of not guilty-bail set at \$50,000.00 surety bond - 30 days for motions is granted- case adjd to 1/7/76 at 10:00 A.M. for trial	
11/17/75	Writ ret'd and filed- executed	
1/7/76	Before BRAMWELL, J.- Case called-adjd to 1/9/76 at 10:00 for trial on consent	
1-8-76	Notice of Readiness for Trial filed	
1-13-76	Petition for Writ of Habeas Corpus Ad Prosequendum filed. Writ Issued	
1-20-76	Writ ret'd and filed - executed.	

DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
1/23/76	Before BRAMWELL, J. - Case called- Deft not present- Counsel M. Seltner of LAS present -Case adjd to 3/1/76 for trial				
2/13/76	Petition for Writ of Habeas Corpus Ad Prosequendum filed				
2/13/76	Writ issued.				
3-1-76	Before BRAMWELL, J - case called - deft & counsel present - case adjd to Mar. 10, 1976 for trial.				
3/3/76	Petition for writ of habeas corpus ad prosequendum filed- writ issued				
3/8/76	Notice of motion to controvert search warrant filed				
	ret. 3/9/76				
3-9-76	Before BRAMWELL, J - case called - deft not present - counsel M. Seltzer present - adjd to 3-11-76.				
3-10-76	Writ ret'd and filed - Unexecuted.				
3-10-76	Petition for Writ of Habeas Corpus Ad Prosequendum filed.				
	Writ Issued.				
3-11-76	Before BRAMWELL, J - case called - defts motion to controvert Search Warrant etc. Motion denied - Wade hearing ordered and BEGUN - Deft moves that the Identification be suppressed - also any and all statements etc. motion denied - hearing concluded - trial ordered - selection of Jurors to be contd on March 15, 1976 at 10:00 am with new Panel.				
3-15-76	Writ ret'd and filed - executed.				
3-15-76	Before BRAMWELL, J - case called - defts & attys present - Trial ordered and begun - Jurors selected and sworn - Trial contd to 3-16-76.				
3/16/75	Before BRAMWELL, J.- Case called- deft and counsel present-trial resumed-deft's motion to controvert search warrant, etc. - motion denied-trial contd to 3/17/76 at 10:00 A.M.				
3-17-76	Before BRAMWELL, J - case called - deft & counsel present - trial resumed - trial contd to 3-18-76.				
3-18-76	Motion and affidavit filed in support of motion for an order by the Court to limit the cross-examination of the deft at trial, etc.				
3/18/76	Before BRAMWELL, J.- Case called- deft and counsel present- trial resumed- govt rests-deft's motion for judgment of acquittal-motion denied- deft renews motion for judgment of acquittal - motion denied-trial contd to 3/19/76				
3/19/76	Before BRAMWELL, J.- Case called- deft and counsel present- trial resumed- jury retires to deliberate jury returns and renders a verdict of guilty as charged- deft's motion to set aside verdict- motion denied- jury polled- jury discharged- trial concluded				
3/19/76	By BRAMWELL, J.- Order of sustenance filed				
4-13-76	Petition for Writ of Habeas Corpus Ad Prosequendum filed.				
	Writ Issued.				
4-15-76	Writ ret'd and filed - executed.				
5/10/76	Petition for writ of habeas corpus adprosequendum filed- issued				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

75 Yr. 73^E Docks

DATE	PROCEEDINGS (continued)	V. EXCLUDAB (a) (b)
(Document No.)		
5/14/76	Before BRAMWELL, J.- Case called- deft and counsel present- deft sentenced to imprisonment for a period of 10 years. The court request that the sentence imposed be made to run concurrent with any sentence imposed in the State Court for any related offense. deft advised of right to appeal	
5/14/76	Judgment and Commitment filed- certified copies to Marshall	
5/18/76	Notice of appeal filed	
5/18/76	Docket entries and duplicate of notice of appeal mailed to court of appeals	
5/19/76	Writ ret'd and filed- executed	
5-24-76	Order Handed to the Court of Appeals that the Record on appeal be docketed on or before June 18, 1976.	
6-14-76	Voucher for expert services filed (transcript of trial for appeal (Jeremendy)	
6-14-76	5 transcripts filed (pgs 1 to 497A) Mar. 15, Mar. 16, Mar. 17, March 18, Mar. 19, 1976)	
6/14/76	Record on appeal certified and handed to Joan Gill for delivery to court of appeals	



RJD:SK:gc
F. #753,352

FILED
CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

OCT 24 1975

TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 CR 785

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UNITED STATES OF AMERICA :

- against - : I N D I C T M E N T

LASZLO JERMENDY and : Cr. No.
JOHN DOE, also known as "Lefty", (T. 18, U.S.C., §641, §2)

Defendants. :

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THE GRAND JURY CHARGES:

On or about the 10th day of June 1975, within the Eastern District of New York, the defendants LASZLO JERMENDY and JOHN DOE, also known as "Lefty", did knowingly and willfully embezzle, steal, purloin and knowingly convert to their use a thing of value of the United States, namely: a .357 magnum Smith & Wesson service revolver, serial number 1K19496, which, on the date in question, was in the possession of Roland O. Lindsay, Special Agent of the United States Secret Service, said revolver having a value in excess of One Hundred Dollars (\$100.00). (Title 18, United States Code, Section 641 and Section 2).

A TRUE BILL

Richard H. Dean
FOREMAN

David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY

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THE COURT: Good morning, ladies and gentlemen.

I will now give you the charge of the Court.

Mr. Foreman, ladies and gentlemen of the jury:

We now come to the final stage of the proceedings.
The court will now charge you on the law to be applied to
the facts in the case.

As you may recall, I initially gave you a pre-
charge as to the manner in which the case would be
presented to you. I told you that most of the evidence
in the case would come in the form of the testimony of
witnesses, and that you were to pay special attention
to the manner in which the witnesses testified.

I believe I also instructed you that you would be
the judges of the facts in the case, that being your

1 sole province; and that your recollection of the facts
2 after having heard all of the evidence in the case - -
3 the testimony of witnesses and the documentary proof - -
4 was to control the determination of the issues.

5 Likewise at that time I told you that I would
6 be the judge of the law. This has not changed at this
7 stage of the proceedings. I will not review the facts
8 in this case for you because I am certain that with
9 summations by the attorneys there is no need for the
10 court to review the facts. In any event, if you find
11 that there is some fact in the case that you may have
12 forgotten or don't recollect, or you can't agree with
13 each other in your deliberations, you can have it read
14 back from the record, and that will, I am sure, refresh
15 your memory.

16 In any event, I am the judge of the law. You
17 must accept what I say to be the law in this case.

18 Now, the attorneys have been permitted by the
19 court and by the rules to make opening statements and
20 summations to you. Under no circumstances are the
21 statements they have made by way of opening or by way of
22 summation to be taken as evidence. However the court and
23 the law does permit you to take the arguments that they
24 have proffered before you and weigh those arguments.
25 And if you agree with what they have said on either side

1 of the case you may use those arguments in your
2 deliberations and in discussing the case with each other,
3 and try to convince one another as to what the final
4 determination shall be with reference to the deliberations
5 at hand.

6 If you feel that the arguments are not
7 commensurate with the testimony and the proof in the
8 case, you may disregard them. The arguments are not
9 evidence. You need not weigh them. However, there are
10 times when the arguments of the attorneys will give you
11 an insight as to something you may have missed, and you
12 may discuss that portion of it if you so desire.

13 Now, of course, I also said to you that during
14 the trial the court will be the judge of the law.
15 Likewise, as to motions which at times we had at a side
16 bar, as you may recall. That was not for the purpose
17 of keeping any of the proof from you, but were matters
18 of law that were discussed between the attorneys and
19 the court itself and should not have come before you.
20 In any event, if you feel that you have discovered by
21 some stretch of your imagination what this court thinks
22 as to either some of the testimony or the case itself,
23 you should remove that from your mind because I tell you
24 here and now I have come to no conclusion in this case
25 nor have I indicated to you in any way whatsoever what

1 my feeling is with reference to the facts in the case or
2 with reference to the guilt or innocence of the defendants.
3 That is your province and your job. You should not try
4 to weigh what you believe the court's impression may be.

5 You must understand that the lawyers who appear
6 before you are advocates. They are advocating the best
7 case they can for the parties they represent and they
8 have a right to exercise as much forcefulness as they
9 desire in their questioning or otherwise in presenting
10 their case. I say this because this is within the
11 framework of the ordinary trial.

12 In determining the facts, the jury is reminded
13 that before each member was accepted and sworn to act as
14 a juror, he was asked questions regarding his competency,
15 qualifications, fairness and freedom from prejudice or
16 sympathy. On the faith of those answers the juror was
17 accepted by the parties. Therefore, those answers are
18 as binding on each of the jurors now as they were then
19 and should remain so until the jury is discharged from
20 consideration of this case.

21 You cannot decide that you do not like the
22 sections of the law that I will quote to you or any
23 other part of the charge. You have the obligation of
24 accepting the law as I charge it, just as I have the
25 obligation of accepting your findings of fact in your

1 ultimate verdict as to the guilt or innocence of each
2 defendant as to each charge.

3 It lends for predictability and stability if
4 judges throughout the country in types of charges such
5 as this, charge uniformly or substantially so and that
6 juries accept it. It would be unfair for you to decide
7 this case on your own notions on what the law should be,
8 and another jury decided on their own notions or what
9 the law should be.

10 That is why the obligation is a firm one and one
11 that you should understand.

12 Of course you know by this time that this case
13 has come before you by way of an indictment presented by
14 a Grand Jury sitting in this Eastern District. That
15 indictment charges the defendant with the counts I shall
16 now read to you. Remember, the indictment is merely an
17 accusation, merely a piece of paper. It is not evidence
18 and is not proof of anything.

19 The Indictment reads as follows:

20 On or about the 10th day of June 1975, within
21 the Eastern District of New York, the defendants LASZLO
22 JERMENDY and JOHN DOE, also known as "Lefty," did
23 knowingly and wilfully embezzle, steal, purloin and
24 knowingly convert to their use a thing of value of the
25 United States, namely: a .357 magnum Smith & Wesson

1 service revolver, serial number 1K19496, which, on the
2 date in question, was in the possession of Roland O.
3 Lindsay, Special Agent of the United States Secret
4 Service, said revolver having a value in excess of One
5 Hundred Dollars (\$100.00), in violation of Title 18,
6 United States Code, Section 641 and Section 2.

7 The Indictment is based on Title 18 of the
8 United States Code, Section 641, and Title 18 of the
9 United States Code, Section 2.

10 Title 18 of the United States Code, Section 641
11 provides in pertinent part as follows:

12 "Whoever steals, purloins, or knowingly converts
13 to his use or the use of another, any thing of
14 value of the United States or of any department
15 or agency thereof" commits an offense against
16 the Laws of the United States.

17 In a case where two or more persons are charged
18 with the commission of a crime, the guilt of any
19 defendant may be established without proof that he
20 personally did every act constituting the offense
21 charged.

22 Section 2 of Title 18 of the United States Code
23 deals with the aiding and abetting of the commission
24 of an offense against the Laws of the United States.
25 Section 2 provides in pertinent part as follows:

1 "Whoever commits an offense against the United
2 States, or aids, abets, counsels, commands,
3 induces, or procures its commission, is punishable
4 as a principal.

5 "Whoever willfully causes an act to be done,
6 which if directly performed by him or another
7 would be an offense against the United States is
8 punishable as a principal."

9 In other words, every person who willfully
10 participates in the commission of a crime may be found
11 to be guilty of that offense. Participation is willful
12 if done voluntarily and intentionally, and with the
13 specific intent to do something the law forbids, or with
14 the specific intent to fail to do something the law
15 requires to be done; that is to say, with bad purpose
16 either to disobey or to disregard the law.

17 In order to aid and abet another to commit a
18 crime it is necessary that the accused willfully
19 associate himself in some way with the criminal venture,
20 and willfully participate in it as he would in something
21 he wishes to bring about; that is to say, that he
22 willfully seek by some act or omission of his to make
23 the criminal venture succeed.

24 An act or omission is "willfully" done, if done
25 voluntarily and intentionally and with the specific
intent to fail to do something the law requires to be
done; that is to say, with bad purpose either to disobey
or to disregard the law.

1 You of course may not find any defendant guilty
2 unless you find beyond reasonable doubt that every
3 element of the offense as defined in these instructions
4 was committed by some person or persons, and that the
5 defendant participated in its commission.

6 In order to cause another person to commit a
7 criminal act, it is necessary that the accused willfully
8 do, or willfully fail to do, something which, in the
9 ordinary performance of official duty, or in the
10 ordinary course of the business or employment of such
11 other person, or by reason of the ordinary course of
12 nature or the ordinary habits of life, results in the
13 other person's either doing something the law forbids,
14 or failing to do something the law requires to be done.

15 An act or a failure to act is "willfully" done,
16 if done voluntarily and intentionally, and with the
17 specific intent to do something the law forbids, or with
18 the specific intent to fail to do something the law
19 requires to be done; that is to say, with bad purpose
20 either to disobey or to disregard the law.

21 Mere presence at the scene of the crime and
22 knowledge that a crime is being committed are not
23 sufficient to establish that the defendant aided and
24 abetted the crime, unless you find beyond reasonable
25 doubt that the defendant was a participant and not

1 merely a knowing spectator.

2 To determine whether a defendant aided and
3 abetted the commission of an offense, you ask yourselves
4 these questions: Did he associate himself with the
5 venture? Did he participate in it as something he
6 wished to bring about? Did he seek by his action to
7 make it succeed? If he did, then he is an aider and
8 abettor.

9 The essential elements of the offense charged in
10 the Indictment, each of which the government must prove
11 beyond a reasonable doubt are:

12 First: That on or about the 10th day of June
13 1975, within the Eastern District of New York, the
14 defendant did knowingly and willfully steal, purloin
15 and convert to his own use a thing of value of the
16 United States, namely: a .357 magnum Smith & Wesson
17 service revolver, serial number 1K19496;

18 Second: That the defendant did such act or acts
19 knowingly, intentionally, and willfully, and with the
20 specific intent to deprive the owner of its property,
21 without its consent, which property on the date in
22 question, was in the possession of Roland O. Lindsay,
23 Special Agent of the United States Secret Service;

24 Third: That the defendant did such act or acts
25 knowingly, willfully, and intentionally, and with the

1 specific intent to convert the gun to his own use;

2 Fourth: That the government did suffer an
3 actual loss;

4 Fifth: That the gun had a value in excess of \$100.

5 You are charged as a matter of law that the
6 government is not required to prove that the defendant
7 charged with theft of property of the United States,
8 was aware that the property taken belonged to the
9 United States.

10 The government must establish the value of the
11 property stolen because the law provides a greater
12 penalty if the value of the property exceeds \$100.
13 Value under this statute means face, par or market
14 value, or cost price, either wholesale or retail,
15 whichever is greater. The value of the property stolen
16 is a question of fact to be determined by the jury.
17 In order to authorize the greater penalty, the govern-
18 ment must establish beyond a reasonable doubt that the
19 value of the property exceeds \$100.

20 Ladies and gentlemen, in your deliberations,
21 please take into consideration the following stipulation
22 entered into between the parties:

23 It is hereby stipulated, consented to and agreed
24 by and between the undersigned that:

25 A) If G.W. Bachmann were to testify in

1 United States of America v. Laszlo Jermendy he would
2 testify as follows:

3 1) That he is the Assistant to the President of
4 Smith and Wesson, Springfield, Massachusetts.

5 2) That the records of Smith and Wesson indicate
6 that the Model 19, serial number 1K19496, was sold to
7 the United States Secret Service on May 17, 1971 and is
8 recorded as a Model 19 ".357 Combat Magnum."

9 3) That the suggested retail price of the Model
10 19 .357 Combat Magnum for the period January 17, 1975
11 through September 9, 1975 was \$157.55 (One Hundred
12 Fifty-Seven Dollars and Fifty-Five Cents) (retail
13 without tax) and \$167.50 (One Hundred Sixty-Seven
14 Dollars and Fifty Cents) (retail with tax).

15 4) That the suggested retail price referred to
16 in (3), supra, is contained in an official document of
17 the Smith and Wesson Company entitled "Hand Guns and
18 Accessories," Suggested Retail Price List, effective
19 January 17, 1975;

20 Further that this document was made in the
21 ordinary course of business at Smith and Wesson and it
22 was the ordinary course of business of Smith and
23 Wesson to make such a document.

24 You are reminded that in considering each of the
25 essential elements of the crime charged in Count One

1 of the Indictment, that whoever aids, abets,
2 counsels, commands, induces or procures the commission
3 of an offense against the laws of the United States is
4 punishable as a principal. In order to aid or abet the
5 commission of an offense against the laws of the United
6 States, a person must associate himself with the criminal
7 venture, participate in it, and try to make it succeed.

8 As stated before, the burden is always upon the
9 prosecution to prove beyond a reasonable doubt every
10 essential element of the crime charged.

11 Always bear in mind that the law never imposes
12 upon a defendant in a criminal case the burden or duty
13 of calling any witnesses or producing any evidence.

14 Ladies and gentlemen, you will note the indict-
15 ment charges that the offense was committed "on or about"
16 a certain date. The proof need not establish with
17 certainty the exact date of the alleged offense. It is
18 sufficient if the evidence in the case establishes
19 beyond a reasonable doubt that the offense was committed
20 on a date reasonably near the date alleged.

21 Please bear in mind the following definitions in
22 considering the essential elements of the crime charged:

23 To steal or to purloin means to acquire or to
24 possess as a result of some wrongful or dishonest act or
25 taking, whereby a person willfully obtains or retains

1 possession of property which belongs to another, without
2 or beyond any permission given, and with the intent to
3 deprive the owner of the benefit of ownership, and to
4 convert the property to his own use or that of another.

5 This means that property was actually taken as
6 distinguished from an unsuccessful attempt to take
7 property.

8 In your determination of whether the United
9 States sustained an actual loss of its property, it is
10 irrelevant that the United States eventually recovers
11 the property previously and actually taken.

12 The law recognizes two kinds of possession: actual
13 possession and constructive possession. A person who
14 knowingly has direct physical control over a thing, at a
15 given time, is then in actual possession of it.

16 A person who, although not in actual possession,
17 knowingly has the power at a given time to exercise
18 dominion or control over a thing, is then in constructive
19 possession of it.

20 The law recognizes also that possession may be
21 sole or joint. If one person has actual or constructive
22 possession of a thing possession is sole. If two or
23 more persons share actual or constructive possession of
24 a thing their possession is joint. If you find from
25 the evidence beyond a reasonable doubt that the

1 defendants, either alone or with others, had actual or
2 constructive possession of the gun described in the
3 indictment, then you may find that the gun was in the
4 possession of the defendant within the meaning of the
5 word "possession" as used in these instructions. Actual
6 manual or personal possession is not a necessary element
7 of the crime, it is sufficient if the possession is
8 constructive, if the merchandise is shown to be under
9 the control of the person charged though in actual
10 physical possession of another. The government does not
11 have to prove that the gun was possessed by the defendant
12 for any particular length of time.

13 "Knowingly" - - An act is done knowingly if done
14 voluntarily and intentionally, and not because of mistake
15 or accident or other innocent reason.

16 The purpose of adding the word "knowingly" was
17 to insure that no one would be convicted for an act
18 done because of mistake, or accident, or other innocent
19 reason.

20 Definition of "Willfully" - - to act:

21 An act is done "willfully" if done voluntarily
22 and intentionally, and with the specific intent to do
23 something the law forbids; that is to say, with bad
24 purpose either to disobey or to disregard the law.

25 Definition of Specific Intent - - Applicable to

1 all offenses charged in the indictment.

2 The crimes charged in this case are serious
3 crimes which require proof of specific intent before a
4 defendant can be convicted. Specific intent, as the
5 term implies, means more than the general intent to
6 commit the act. To establish specific intent, the
7 government must prove that a defendant knowingly did an
8 act which the law forbids, purposely intending to
9 violate the law. Such intent may be determined from all
10 the facts and circumstances surrounding the case.

11 Intent ordinarily may not be proved directly,
12 because there is no way of fathoming or scrutinizing the
13 operations of the human mind. But you may infer the
14 defendant's intent from the surrounding circumstances.
15 You may consider any statement made and act done or
16 omitted by a defendant, and all other facts and circum-
17 stances in evidence which indicate his state of mind.
18 It is ordinarily reasonable to infer that a person
19 intends the natural and probable consequences of acts
20 knowingly done or knowingly omitted.

21 Reasonable Doubt: Now, there are in any case, and
22 in this one, two types of evidence from which a jury may
23 properly find a defendant guilty of a crime, one is
24 direct evidence such as testimony of an eye witness, the
25 other is circumstantial evidence which is proof of a

1 chain of facts and circumstances pointing to the
2 commission of the offense.

3 As a general rule, the law makes no distinction
4 between direct and circumstantial evidence, but simply
5 requires that before convicting a defendant the jury
6 must be satisfied of the defendant's guilt beyond a
7 reasonable doubt from all the evidence in the case.

8 A defendant is presumed innocent of the crime.
9 Thus the defendant, although accused, begins the trial
10 with a clean slate and with no evidence against him, and
11 the law permits nothing but legal evidence to be
12 presented before a jury to be considered in support of
13 any charge against the accused, so that the presumption
14 of innocence alone is sufficient to acquit a defendant
15 unless you, the jury, are satisfied beyond a reasonable
16 doubt of the defendant's guilt after careful and
17 impartial consideration of all the evidence in the case.

18 It is not required that the government prove guilt
19 beyond all possible doubt. The test is one of reasonable
20 doubt, and reasonable doubt is doubt based upon reason
21 and common sense, the kind of doubt that would make a
22 reasonable person hesitate to act. Proof beyond a
23 reasonable doubt must, therefore, be proof of such a
24 convincing character that you would be willing to rely
25 and act upon it unhesitatingly in the most important of

1 your own affairs.

2 You, the jury, will remember that a defendant is
3 never to be convicted on mere suspicion or conjecture.
4 The burden is always upon the prosecution to prove guilt
5 beyond a reasonable doubt. This burden never shifts to
6 a defendant. The law never imposes upon a defendant in
7 a criminal case the burden or duty of calling any
8 witnesses or producing any evidence.

9 So, if the jury views the evidence in the case as
10 reasonably permitting either of two conclusions, one of
11 innocence, the other of guilt, you, the jury, should, of
12 course, adopt the conclusion of innocence.

13 I have said that the defendant may be proven
14 guilty either by direct or circumstantial evidence. I
15 have said that direct evidence is the testimony of one
16 who asserts actual knowledge of a fact, such as an eye
17 witness. Also circumstantial evidence is proof of a
18 chain of facts and circumstances indicating the guilt or
19 innocence of a defendant. You, the jury, may make
20 common sense inferences from the proven facts.

21 It is not necessary that all inferences drawn
22 from the facts in evidence be consistent only with guilt
23 and inconsistent with every reasonable hypothesis of
24 innocence.

25 The test is one of reasonable doubt, and should

1 be based upon all the evidence, the testimony of the
2 witnesses, the documents offered into evidence and the
3 reasonable inferences which can be drawn from the proven
4 facts.

5 An inference is a deduction or conclusion which
6 reason and common sense lead the jury to draw from the
7 facts which have been proved. You are to consider only
8 the evidence in the case. But in your consideration of
9 the evidence you are not limited to the bald statements
10 of the witnesses. On the contrary, you are permitted to
11 draw, from the facts which you find have been proved,
12 such reasonable inferences as seem justified in the light
13 of your own experience.

14 A reasonable doubt may arise not only from the
15 evidence produced, but also from a lack of evidence.
16 Since the burden is upon the prosecution to prove the
17 accused guilty beyond a reasonable doubt of every
18 essential element of the crime charged, a defendant has
19 the right to rely upon failure of the prosecution to
20 establish such proof.

21 Proof of Knowledge and Intent: Knowledge and
22 intent exist in the mind. Since it is not possible to
23 look into a man's mind to see what went on, the only
24 way you have for arriving at a decision in these
25 questions is for you to take into consideration all the

1 facts and circumstances shown by the evidence, including
2 the exhibits, and to determine from all such facts and
3 circumstances whether the requisite knowledge and intent
4 were present at the time in question. Direct proof is
5 unnecessary. Knowledge and intent may be inferred from
6 all the surrounding circumstances.

7 As far as intent is concerned, you are instructed
8 that a person is presumed to intend the natural and
9 probable, or ordinary, consequences of his acts.

10 Credibility of Witnesses:

11 You as jurors are the sole judges of the
12 credibility of the witnesses and the weight their
13 testimony deserves, and it goes without saying that you
14 should scrutinize all the testimony given, the circum-
15 stances under which each witness has testified, and
16 every every matter in evidence which tends to show
17 whether a witness is worthy of belief. Consider each
18 witness' intelligence, motive and state of mind, and
19 his demeanor and manner while on the stand. Consider
20 the witness' ability to observe the matters as to which
21 he has testified, and whether he impresses you as having
22 an accurate recollection of these matters. Consider
23 also any relation each witness may bear to either side
24 of the case; the manner in which each witness might be
25 affected by the verdict; and the extent to which, if at

1 all, each witness is either supported or contradicted by
2 other evidence in the case.

3 Inconsistencies or discrepancies in the testimony
4 of a witness, or between the testimony of different
5 witnesses, may or may not cause the jury to discredit
6 such testimony. Two or more persons witnessing an
7 incident or a transaction may see or hear it differently;
8 and innocent misrecollection, like failure of recollection,
9 is not an uncommon experience.

10 In weighing the effect of a discrepancy, always
11 consider whether it pertains to a matter of importance or
12 an unimportant detail, and whether the discrepancy results
13 from innocent error or intentional falsehood.

14 After making your own judgment, you will give the
15 testimony of each witness such credibility, if any, as
16 you may think it deserves. Another test that you can use
17 in determining the truthfulness or credibility of a
18 witness is to use your own good common sense in addition
19 to these essentials that I have given you. You can use
20 your good common sense as you do in your everyday
21 experience where you must make important decisions based
22 upon what others tell you. When you decide to either
23 accept or ignore the statements of others you use your
24 common sense. Your good judgment will say to you somehow
25 or other that whatever they say does not appear to be

1 truthful, that somehow or other you just do not believe
2 what they have said. That is your ability to reason,
3 your ability to determine the truthfulness of the person
4 you are speaking with. Likewise, your common sense
5 should be used to determine the weight to be given the
6 testimony of a witness.

7 You take that same good common sense into the
8 jury room, you do not leave it outside. In addition to
9 what I have said, use your common sense as a test in
10 exercising your good judgment and in determining whether
11 or not this defendant is guilty of the crimes charged.
12 It is for you to determine whether the witnesses in this
13 case have testified truthfully, whether or not they have
14 an interest in the case, what that interest may be and how
15 great it is and whether or not they have told you false-
16 hoods. This is all for you to determine.

17 Every witness' testimony must be weighed as to
18 its truthfulness. If you find any witness lied as to
19 any material fact in the case - - then the law gives you
20 certain privileges. One of those privileges is that you
21 have the right to disregard the entire testimony of that
22 witness. If you find, however, that you can sift through
23 that testimony and determine which of the testimony is
24 true and which was false, then the law allows you to
25 take the portions which were true and weigh it and

1 disregard those portions which were false. That again
2 is within your prerogative.

3 The weight of the evidence is not necessarily
4 determined by the number of witnesses testifying on
5 either side. You should consider all the facts and
6 circumstances in evidence to determine which of the
7 witnesses are worthy of greater credence. You may find
8 that the testimony of a smaller number of witnesses on
9 one side is more credible than the testimony of a greater
10 number of witnesses on the other side.

11 You are not obliged to accept testimony, even
12 though the testimony is uncontradicted and the witness
13 is not impeached. You may decide, because of the
14 witness' bearing and demeanor, or because of the inherent
15 improbability of his testimony, or for other reasons
16 sufficient to you, that such testimony is not worthy of
17 belief.

18 The government is not required to prove the
19 essential elements of the offense as defined in these
20 instructions by any particular number of witnesses.

21 - The testimony of a single witness may be sufficient to
22 convince you beyond a reasonable doubt of the existence
23 of an essential element of the offense charged, if you
24 believe beyond a reasonable doubt that the witness is
25 telling the truth.

1 Testimony of Federal Officials:

2 The probable truthfulness and believability of
3 every witness is for you, and for each of you to decide;
4 that I have already instructed you. The fact that such
5 witnesses come before you as government agents should not
6 in the least change your attitude in this respect.
7 Their testimony does not deserve either greater or lesser
8 believability, simply because of their official status.

9 Whether you do, or do not, believe any witness
10 must depend upon how truthful you judge that witness to
11 be after you have heard the testimony and formed your
12 own conclusions as to the witness' believability.

13 Evidence - - Identify - - Fingerprints:

14 Where the true identity of a person is in issue,
15 any proved or admitted fingerprint of this person may
16 be received in evidence to be used as an exemplar or
17 specimen, for comparison with any fingerprint in dispute.

18 Opinion Evidence - - Expert Witness:

19 The rules of evidence ordinarily do not permit
20 witnesses to testify as to opinions or conclusions. An
21 exception to this rule exists as to those whom we call
22 "expert witnesses." Witnesses who, by education and
23 experience, have become expert in some art, science,
24 profession, or calling, may state an opinion as to
25 relevant and material matter, in which they profess to

1 be expert, and may also state their reasons for the
2 opinion.

3 You should consider each expert opinion received
4 in evidence in this case, and give it such weight as you
5 may think it deserves. If you should decide that the
6 opinion of an expert witness is not based upon sufficient
7 education and experience, or if you should conclude that
8 the reasons given in support of the opinion are not
9 sound, or that the opinion is outweighed by other
10 evidence, you may disregard the opinion entirely.

11 When a defendant in a case of this kind takes
12 the stand, which he has a perfect right to do, he is
13 subjected to all the obligations of witnesses, and his
14 testimony is to be treated like the testimony of any
15 other witnesses; that is to say, it will be for you to
16 say, remembering the substance of his testimony, the manner
17 in which he gave it, his cross-examination, and every-
18 thing else in the case, whether or not he told the
19 truth. Then, again, it is for you to remember, you
20 have a perfect right to do so, the interest the
21 defendant has in the case. As he places himself as a
22 witness, he stands like any other witness.

23 Evidence that at some other time a witness, other
24 than the accused, has said or done something, or has
25 failed to say or do something, which is inconsistent

1 with the witness' testimony at the trial, may be
2 considered by the jury for the sole purpose of judging
3 the credibility of the witness; but may never be
4 considered as evidence or proof of the truth of any such
5 statement.

6 Where a witness is a defendant on trial in the
7 case and, by such statements or other conduct, the
8 defendant admits some fact against his interest, then
9 the statement or other conduct, if knowingly made or
10 done, may be considered as evidence of the truth of the
11 fact so admitted, as well as for the purpose of judging
12 the credibility of the defendant as a witness.

13 An act or omission is "knowingly" done, if done
14 voluntarily and intentionally, and not because of
15 mistake or accident or other innocent reason.

16 Evidence relating to any statement, or act or
17 omission, claimed to have been made or done by a defendant
18 outside of court, and after a crime has been committed,
19 should always be considered with caution and weighed
20 with great care; and all such evidence should be dis-
21 regarded entirely, unless the evidence in the case
22 convinces the jury beyond a reasonable doubt that the
23 statement or act or omission was knowingly made or done.

24 A statement or act or omission is "knowingly"
25 made or done, if done voluntarily and intentionally, and

1 not because of mistake or accident or other innocent
2 reason.

3 In determining whether any statement or act or
4 omission claimed to have been made by a defendant
5 outside of court, and after a crime has been committed,
6 was knowingly made or done, the jury should consider the
7 age, sex, training, education, occupation, and physical
8 and mental condition of the defendant, and his treatment
9 while in custody or under interrogation, as shown by the
10 evidence in the case; and also all other circumstances
11 in evidence surrounding the making of the statement or
12 act or omission was made or done, the defendant knew or
13 had been told and understood that he was not obligated
14 or required to make or do the statement or act or
15 omission claimed to have been made or done by him; that
16 any statement or act or omission which he might make or
17 do could be used against him in court; that he was
18 entitled to the assistance of counsel before making any
19 statement, either oral or in writing, or before doing
20 any act or omission; and that if he was without money or
21 means to retain counsel of his own choice, an attorney
22 would be appointed to advise and represent him free of
23 cost or obligation.

24 If the evidence in the case does not convince
25 beyond a reasonable doubt that a confession was made

1 voluntarily and intentionally you should disregard it
2 entirely. On the other hand, if the evidence in the
3 case does show beyond a reasonable doubt that a
4 confession was in fact voluntarily and intentionally
5 made by a defendant, you may consider it as evidence in
6 the case against the defendant who voluntarily and
7 intentionally made the confession.

8 If it appears from the evidence in the case that
9 a confession (admission) would not have been made, but
10 for some threat of harm or some offer or promise of
11 immunity from prosecution, or leniency in punishment,
12 or other reward, such a confession should not be consid-
13 ered as having been voluntarily made, because of the
14 danger that a person accused might be persuaded by the
15 pressure of hope or fear to confess as facts things
16 which are not true, in an effort to avoid threatened
17 harm or punishment, or to secure a promised reward.

18 If the evidence in the case leaves the jury with
19 a reasonable doubt as to whether a confession was volun-
20 tarily made, then the jury should disregard it entirely.

21 The jury will always bear in mind that the law
22 never imposes upon a defendant in a criminal case the
23 burden or duty of calling any witnesses or producing
24 any evidence.

25 Evidence as to any oral admissions, claimed to

1 have been made outside of court by a party to any case,
2 should always be considered with caution and weighed
3 with great care. The person making the alleged admission
4 may have been mistaken, or may not have expressed
5 clearly the meaning intended; or the witness testifying
6 to an alleged admission may have misunderstood, or may
7 have misquoted what was actually said.

8 However, when an oral admission made outside of
9 court is proved by reliable evidence, such an admission
10 may be treated as trustworthy, and should be considered
11 along with all other evidence in the case.

12 Identification testimony is an expression of
13 belief or impression by the witness. Its value depends
14 on the opportunity the witness had to observe the offender
15 at the time of the offense and to make a reliable
16 identification later.

17 In appraising the identification testimony of a
18 witness, you should consider the following:

19 (1) Are you convinced that the witness had the
20 capacity and an adequate opportunity to observe the
21 offender?

22 Whether the witness had an adequate opportunity
23 to observe the offender at the time of the offense will
24 be affected by such matters as how long or short a time
25 was available, how far or close the witness was, how

1 good were lighting conditions, whether the witness had
2 had occasion to see or know the person in the past.

3 In general, a witness bases any identification he
4 makes on his perception through the use of his senses.
5 Usually the witness identifies an offender by the sense
6 of sight - - but this is not necessarily so, and he may
7 use other senses.

8 (2) Are you satisfied that the identification made
9 by the witness subsequent to the offense was the product
10 of his own recollection? You may take into account
11 both the strength of the identification, and the
12 circumstances under which the identification was made.

13 If the identification by the witness may have
14 been influenced by the circumstances under which the
15 defendant was presented to him for identification, you
16 should scrutinize the identification with great care.
17 You may also consider the length of time that lapsed
18 between the occurrence of the crime and the next
19 opportunity of the witness to see defendant, as a
20 factor bearing on the reliability of the identification.

21 You may also take into account that an identifica-
22 - tion made by picking the defendant out of a group of
23 similar individuals is generally more reliable than one
24 which results from the presentation of the defendant
25 alone the witness.

1 Finally, you must consider the credibility of
2 each identification witness in the same way as any other
3 witness, consider whether he is truthful, and consider
4 whether he had the capacity and opportunity to make a
5 reliable observation on the matter covered in his
6 testimony.

7 I again emphasize that the burden of proof on the
8 prosecutor extends to every element of the crime charged,
9 and this specifically includes the burden of proving
10 beyond a reasonable doubt the identity of the defendant
11 as the perpetrator of the crime with which he stands
12 charged. If after examining the testimony, you have a
13 reasonable doubt as to the accuracy of the identification,
14 you must find the defendant not guilty.

15 The law does not require the prosecution to call
16 as witnesses all persons who may have been present at
17 any time or place involved in the case, or who may
18 appear to have some knowledge of the matters in issue
19 at this trial. Nor does the law require the prosecution
20 to produce as exhibits all papers and things mentioned
21 in the evidence.

22 However, in judging the credibility of the
23 witnesses who have testified, and in considering the
24 weight and effect of all evidence that has been produced,
25 the jury may consider the prosecution's failure to call
other witnesses or to produce other evidence shown by

1 the evidence in the case to be in existence and available.

2 The jury will always bear in mind that the law
3 never imposes upon a defendant in a criminal case the
4 burden or duty of calling any witnesses or producing any
5 evidence, and no adverse inferences may be drawn from his
6 failure to do so.

7 If it is peculiarly within the power of either the
8 prosecution or the defense to produce a witness who could
9 give material testimony on an issue in the case, failure to
10 call the witness may give rise to an inference that his
11 testimony would be unfavorable to that party. However,
12 no such conclusion should be drawn by you with regard to
13 a witness who is equally available to both parties or
14 where the witness' testimony would be merely cumulative.

15 The jury will always bear in mind that the law
16 never imposes on a defendant in a criminal case the
17 burden or duty of calling any witnesses or producing
18 any evidence.

19 There is nothing peculiarly different in the way
20 a jury should consider the evidence in a criminal case,
21 from that in which all reasonable persons treat any
22 question depending upon evidence presented to them. You
23 are expected to use your good sense; consider the
24 evidence in the case for only those purposes for which
25 it has been admitted, and give it a reasonable and fair

1 construction, in the light of your common knowledge of
2 the natural tendencies and inclinations of human beings.

3 If an accused be proved guilty beyond reasonable
4 doubt say so. If not so proved guilty, say so.

5 Keep constantly in mind that it would be a
6 violation of your sworn duty to base a verdict of guilty
7 upon anything other than the evidence in the case; and
8 remember as well that the law never imposes upon a
9 defendant in a criminal case the burden or duty of
10 calling any witnesses or producing any evidence.

11 The jury is directed to consider the evidence of
12 the prior similar act of grand larceny in the second
13 degree only for the purpose of showing the defendant's
14 knowledge, intent, absence of mistake or accident,
15 regarding the crime charged in the instant case.

16 You are emphatically directed that you may not
17 consider evidence of alleged prior similar acts to prove
18 the character of a person in order to show that he acted
19 in conformity therewith on the particular occasion
20 charged in the Indictment. That is to say, that you may
21 not consider such evidence of alleged prior similar acts
22 to show that the defendant had a pre-disposition to
23 commit the act charged in the Indictment.

24 If any reference by the court or by counsel to
25 matters of evidence does not coincide with your own

1 recollection, it is your recollection which should control
2 during your deliberations.

3 Now, under your oath as jurors you cannot allow a
4 consideration of the punishment which may be inflicted
5 upon the defendant, if convicted, to influence your
6 verdict in any way or in any sense enter into your
7 deliberations.

8 The duty of imposing sentence rests exclusively
9 upon the court. Your function is to weigh the evidence
10 in the case and to determine the guilt or innocence of
11 the defendant solely upon the basis of such evidence and
12 the law.

13 You are to decide the case upon the evidence, and
14 the evidence alone, and you must not be influenced by any
15 assumption, conjecture, or sympathy, or any inference not
16 warranted by the facts until proven to your satisfaction.

17 In reaching your verdict, you are not to be
18 affected by sympathy or antipathy for any of the parties,
19 what the reaction of the parties or of the public to
20 your verdict may be, whether it will please or displease
21 anyone, be popular or unpopular or indeed, any considera-
22 - tion outside the case as it has been presented to you in
23 this courtroom.

24 You should consider only the evidence - - both
25 the testimony and the exhibits - - find the facts from

1 what you consider to be the believable evidence, and
2 apply the law as I now give it to you to those facts.
3 Your verdict will be determined by the conclusion thus
4 reached, no matter whom the verdict helps or hurts.

5 Now, in this type of case there must be a
6 unanimous verdict, that means all twelve of you must
7 agree, and it goes without saying, that it becomes
8 incumbent upon you to listen to one another and to argue
9 out the points among yourselves in order to determine in
10 good conscience whether your fellow jurors' argument is
11 one commensurate with yours or whether at least you can
12 with good conscience agree with him. You have no right
13 to stubbornly and idly sit by and say, "I am not talking
14 to anyone," "I am not going to discuss it," because
15 people with common sense and the ability to reason must
16 communicate, they must communicate their thoughts. So,
17 anything which appears in the record and about which one
18 of you may not agree - - talk it out amongst yourselves
19 and then if you can't agree as to what is in the record,
20 well, you can ask the court to have that portion of the
21 testimony read back to you. You may do so by knocking
22 on the door and giving a note in writing to the U.S.
23 Marshal who will then present it to the court, and I
24 will then bring you into the courtroom.

25 The foreman will preside over your deliberations,

1 and will be your spokesman here in court.

2 As to the form of the verdict the verdict is either
3 not guilty or guilty.

4 At this time I will discharge the alternates one,
5 two and three with the thanks of the court.

6 Lunch will be here at 12:00 o'clock and the
7 marshals will bring it to you or you may leave at this
8 time. You are discharged with the thanks of the court.

9 (The alternates left the courtroom.)

10 I wish to say further in connection with your
11 deliberations I will give you a copy of the indictment
12 to use during your deliberations and all of the evidence.
13 All of the evidence will be sent in there for you to use
14 during your deliberations. I think I will leave out the
15 bullets, everything else can go in.

16 I will speak to the attorneys at side bar.

17 (A side bar was held without the hearing of the
18 jury as follows:)

19 THE COURT: Are there any exceptions to the
20 charge?

21 MS. SELTZER: I thought it was an extremely fair
22 charge. The only exception I would have was the one I
23 made before about prior similar acts, the whole discussion
24 we had yesterday, otherwise I think it was fair.

25 MR. WEINBACH: The government has no objection,

1 your Honor.

2 THE COURT: Thank you.

3 MR. WEINBACH: Do you want all the exhibits?

4 THE COURT: Everything. Do not send the bullets in.

5 MR. WEINBACH: I have everything but the rifle.

6 THE COURT: Bring that up, they are to get every-
7 thing.

8 (The side bar was concluded.)

9 THE COURT: I might say the lunch will be in at
10 12:00 o'clock so at 12:00 o'clock you can stop your
11 deliberations and have your lunch and after lunch you may
12 resume your deliberations.

13 The Clerk may swear the marshals in.

14 (The marshals were duly sworn.)

CERTIFICATE OF SERVICE

September 10, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan J. Silbermann